

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPHINE NELSON and	:	CIVIL ACTION
MICHELE M. JOHNSON	:	
	:	
Individually and	:	
on Behalf of All Persons	:	
Similarly Situated	:	
	:	
v.	:	
	:	
ASTRA MERCK, INC.	:	NO. 98-1283

MEMORANDUM AND ORDER

HUTTON, J.

October 21, 1998

Presently before this Court is the Plaintiffs' Motion for Class Certification (Docket No. 13), Defendant's response thereto (Docket No. 15) and Affidavit of Robert C. Stoner in Support of Defendant's response (Docket No. 16).

BACKGROUND

Named plaintiffs, Josephine Nelson and Michele M. Johnson, black employees of the Defendant Astra Merck, Inc. ("Astra Merck"), bring this action on behalf of themselves and all black employees who are now or have been employed by Astra Merck within the United States from 1994 to date. (Pls.' Mot. Class Certification at 1.) The Plaintiffs claim that Astra Merck discriminated against black employees in the terms and conditions of their employment, including being treated differently from white employees of equal status, experience, and qualifications

regarding salary, benefits, performance evaluations, promotions, merit increases and terminations, as well as suffering retaliation for filing charges of discrimination based on their race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., as amended by the Civil Rights Act of 1991, and the Civil Rights Act of 1870, 42 U.S.C. § 1981.

On June 9, 1998, the Plaintiffs filed the instant motion seeking class certification. On June 30, 1998, the Defendant filed its response in opposition and an affidavit of Robert C. Stoner in support of its motion in opposition. For the foregoing reasons, the Plaintiffs' motion is denied with leave to renew.

DISCUSSION

Class Action Certification

In order for a court to certify a class, a plaintiff must demonstrate compliance with Federal Rule of Civil Procedure 23. Fed. R. Civ. P. 23(a), 28 U.S.C. (1994). This rule requires a plaintiff to "satisfy all of the requirements of Rule 23(a) and come within one provision of Rule 23(b)." Georgine v. Amchem Prods., Inc., 83 F.3d 610, 624 (3d Cir.), vacated and cert. granted sub nom., Amchem Prods., Inc. v. Windsor, 117 S. Ct. 379 (1996). Accordingly, a court may approve a class certification only after determining that a plaintiff has rigorously complied

with the following Rule 23(a) requirements: numerosity, commonality, typicality, and adequacy of representation. General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 161 (1982). Once a plaintiff satisfies these elements, the putative class representative must establish that the suit fits into one of the categories enumerated in Rule 23(b). Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 163 (1974). Nonetheless, certification of a class under Rule 23(b) is a largely discretionary matter for the court. Bogus v. American Speech & Hearing Ass'n, 582 F.2d 277, 289-90 (3d Cir. 1978).

In addition to setting forth the class certification requirements, Rule 23 also provides that:

As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

Fed. R. Civ. P. 23(c)(1). In other words, even though a court enters a class certification order, "[u]nder Rule 23(c)(1), the court retains the authority to redefine or decertify the class until the entry of final judgment on the merits. This capacity renders all certification orders conditional until the entry of judgment." In re Gen. Motors Corp. Pickup Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 792 n. 14 (3d Cir.), cert. denied sub

nom., General Motors Corp. v. French, 116 S. Ct. 88 (1995).

Furthermore,

[a]lthough an order of certification under Rule 23(c)(1) "may be conditional, and may be altered or amended before the decision on the merits," it should not be treated as tentative and should be made only after consideration of all available relevant information. . . . [D]evelopments in the litigation, such as the discovery of new facts or changes in parties or in the substantive or procedural law, will necessitate reconsideration of the earlier order and the granting or denial of certification or redefinition of the class.

Manual for Complex Litigation, Third at § 30.18 (1995).

In the instant case, the Plaintiffs do not satisfy the first requirement of Rule 23(a). The first requirement under Rule 23(a), that of numerosity, requires the impracticability of joinder. Fed. R. Civ. P. 23(a)(1). "Impracticability is a subjective determination based on number, expediency and inconvenience of trying individual suits." Pabon v. McIntosh, 546 F. Supp. 1328, 1333 (E.D.Pa. 1982). The Plaintiffs allege that Astra Merck employs "over 2,200 persons nationwide" and "hundreds of black persons in the United States." (Pls.' Mem. Law Supp. Mot. Class Certification at 12.) Moreover, the Plaintiffs argue that "hundreds of class members are probably dispersed throughout the United States." (Id. at 13.)

Regardless of the number of black persons employed by Astra Merck in the United States, the Plaintiffs must show that

some other persons, besides themselves, have suffered from discrimination by the Defendant. See Mazus v. Dept. of Transp. Com. of Pa., 629 F.2d 870, 876 (3d Cir.), cert. denied, 449 U.S. 1126 (1980) (refusing to certify woman's sex discrimination action against Pennsylvania Department of Transportation as a class action, in view of fact that there was no evidence that any other female ever applied for road-worker job with the Department).

The Plaintiffs do not offer any specific evidence by which this Court could determine that a single employee of Astra Merck other than the Plaintiffs themselves had been discriminated against on the basis of race; let alone that the number of black employees who have suffered from discrimination by the Defendant is so great that their joinder would be impracticable. See Robinson v. Lehman, 771 F.2d 772, 783 (3d Cir. 1985) (finding that black federal employee who brought Title VII employment discrimination action was not entitled to class certification for class of black employees, absent showing that number of blacks that were precluded from attaining supervisory and managerial positions was so numerous that joinder of all members was impracticable) (citing Fed. R. Civ. P. 23(a)(1)). "[A] Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." General

Telephone Company of the Southwest v. Falcon, 457 U.S. 147, 161, (1982). Because the Plaintiffs have not satisfied the numerosity requirement of Rule 23(a)(1), their motion for class certification is denied with leave to renew following completion of discovery.

An appropriate Order follows.

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ASTRA MERCK, INC.	:	NO. 98-1283

O R D E R

AND NOW, this 21st day of October, 1998, upon consideration of Plaintiffs' Motion for Class Certification (Docket No. 13), Defendant's response thereto (Docket No. 15) and Affidavit of Robert C. Stoner in Support of Defendant's response (Docket No. 16), IT IS HEREBY ORDERED that Plaintiffs' Motion for Class Certification is **DENIED with leave to renew** following close of discovery.

BY THE COURT:

HERBERT J. HUTTON, J.